In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1219

JAMES F. SEXTON, PETITIONER

v.

WILLIAM E. SIMON, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner brought this action in the United States District Court for the Northern District of Ohio, seeking reinstatement to government employment as an Internal Revenue agent in Cleveland, Ohio. The district court granted summary judgment for the government, holding that petitioner's reassignment from the IRS district office in Cleveland, Ohio, to the IRS district office in Dayton, Ohio, was not an abuse of administrative discretion, and that his subsequent discharge for failure to report for duty in Dayton was lawful (Pet. App. A4-A10). The court of appeals affirmed (Pet. App. A12-A22).

Petitioner was an employee of the Internal Revenue Service at its Cleveland, Ohio, office from 1954 to August 1966. As a result of petitioner's incompatability with his supervisors in the Cleveland office, and the disruption of the work of the office that was occasioned

by his frequent complaints (R. 15, 46-47, 66-68, 96-112, 136-155, 185),[1] petitioner was reassigned by the Regional Commissioner of the IRS, at the same position and salary, to the IRS district office in Dayton, Ohio, effective August 29, 1965. Petitioner objected to the reassignment and filed a grievance petition. The reassignment was postponed pending resolution of this grievance. On June 20, 1966, the Director of Personnel, Department of the Treasury, affirmed the reassignment to Dayton, and it became effective on August 28, 1966 (see R. 259-260, 447).

Petitioner failed to report for duty at the IRS office in Dayton on August 28, 1966. The Regional Commissioner issued a notice of proposed discharge (R. 399-400), and petitioner was placed in "absent without leave" status until November 4, 1966, at which time he was separated for declining assignment to Dayton (R. 293, 400). Petitioner appealed, contending that the reassignment was illegal, and, accordingly, that he should not be removed from service for failing to accept the reassignment (R. 403-407). The Regional Commissioner of the IRS (R. 379-381) and the Regional Office of the Civil Service Commission (R. 289-297) sustained the discharge without permitting petitioner to reargue the propriety of the transfer, which had been sustained in the earlier grievance proceeding. However, the Board of Appeals and Review of the Civil Service Commission, in a decision issued on May 17, 1967, held that petitioner had a right to challenge the propriety of the transfer. Accordingly, the Board reversed the discharge action as "procedurally defective," and recommended that petitioner be restored to government service retroactive to November 4, 1966 (R. 273-276). Thereafter, the IRS Regional

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[1] "R." refers to the Administrative Record.

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Commissioner again assigned petitioner to the Dayton office, with a reporting date of June 12, 1967 (extended to June 26, 1967 at petitioner's request) (R. 260, 267-269).

Petitioner again failed to report, and on July 6, 1967, a new notice of proposed discharge was issued by the Regional Commissioner of IRS (R. 259-262). Petitioner this time was afforded the opportunity to make written and oral responses urging that the original transfer was improper (R. 213, 244-256). On December 14, 1967, the Regional Commissioner of IRS notified petitioner that he had reviewed petitioner's responses and had concluded that petitioner, having refused to accept the reassignment, should be removed effective December 29, 1967 "in order to promote the efficiency of the Service" (R. 198).

Petitioner appealed this decision to the Regional Office of the Civil Service Commission (R. 192-197). A hearing was held on April 11, 1968, the main issue being the propriety of the transfer from Cleveland to Dayton (R. 61-115).[2] In its decision of June 18, 1968, the Regional Office found that petitioner had failed to report for duty in Dayton on June 26, 1967, and that the transfer from Cleveland to Dayton was a proper exercise of the agency's prerogative in view of friction between petitioner and his supervisor, and was not a reprisal (R. 42-48). This decision was affirmed by the Board of

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[2]Petitioner also claimed back pay for the period from August 28, 1966 to June 26, 1967, citing the recommendation of the Civil Service Commission that he be restored retroactively to service from November 4, 1966. The General Accounting Office in a letter of November 20, 1968, denied back pay on the ground that an employee must be "ready, willing and able to perform [his] duties" in order to receive back pay, and that petitioner's refusal to report for assigned duties on June 26, 1967, barred back pay.

Appeals and Review of the Civil Service Commission (R. 11-16). In its Finding No. 11, the Board stated (R. 15):

> The preponderance of the evidence does not indicate that appellant's reassignment was designed "to stifle valid criticism directed to the handling of tax liabilities". Instead, it indicates inability of appellant to get along with his supervisors because of an exaggerated idea of his own abilities.

The Board denied a petition for reconsideration (R. 1-2, 3-6).

Petitioner thereafter initiated this action in the district court, contending that his transfer and subsequent discharge were illegally motivated by his criticism of his supervisors and hence was arbitrary, capricious, and violative of his First Amendment rights (Compl., para. 15). The district court, upon its own review of the record, held that the removal action conformed with applicable procedures and was not an abuse of administrative discretion (Pet. App. A4-A10). The court of appeals affirmed (Pet. App. A12-A22).

The court of appeals, while stating that a government transfer is not *per se* reviewable as "adverse action" (Pet. App. A18; see 5 U.S.C. 7511 and 7512), acknowledged that "if plaintiff had made his case that his transfer was a mere pretext to suppress his First Amendment rights, he might still prevail" (Pet. App. A19), citing *Motto* v. *General Services Administration,* 335 F. Supp. 694 (E.D. La.), affirmed, 502 F.2d 1165 (C.A. 5), certiorari denied, 420 U.S. 927.

However, the court of appeals went on to observe that the Civil Service Commission here had found that the criticisms in question indicated "inability of appellant to get along with his supervisors because of an exaggerated idea of his own abilities" (R. 15; Pet. App. A20). The court continued: "As to this issue the District Judge found that the record amply demonstrates that the

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reassignment was neither 'arbitrary, capricious nor unreasonable'; and we agree" (Pet. App. A20). The court of appeals accordingly upheld the district court's ruling that the transfer was not unlawful.

The court of appeals further held that certain documents allegedly "missing" from the administrative record, which had been examined by the district court, "had little, if anything, to do with the merits of plaintiff's claims" (Pet. App. A21). Finally, the court of appeals ruled that petitioner was not entitled to back pay for the period from August 28, 1966 to June 26, 1967, since the transfer to Dayton was valid and petitioner had refused to report for duty (Pet. App. A22).

1. The court of appeals acknowledged that a transfer of a government employee simply as a pretext to suppress his First Amendment rights would be reviewable adverse action (Pet. App. A19), but held that the facts of record in this case did not warrant the conclusion that the transfer was motivated by a desire to infringe First Amendment rights, as opposed to a legitimate desire to alleviate difficulties with petitioner's compatability and supervision in the Cleveland district office (Pet. App. A20). Thus contrary to petitioner's contention (Pet. 9-11), this decision presents no conflict among the courts of appeals with respect to whether a transfer on account of protected speech would be reviewable.

2. There is, as petitioner contends (Pet. 12-15), a disagreement among the courts of appeals concerning whether, in a suit brought to review an adverse personnel action, the reviewing court inquires only into whether the action was in compliance with applicable statutes and regulations and was not arbitrary, capricious, or unreasonable, or, additionally, into whether it was supported by substantial evidence. Compare, *e.g.*, *Charlton* v.

United States, 412 F.2d 390 (C.A. 3), with, *e.g.*, *Pauley* v. *United States*, 419 F.2d 1061 (C.A. 7). In this case the court of appeals followed *Pauley* in refusing to review the substantiality of the evidence. But this is not an appropriate vehicle for resolution of that long-standing conflict. Review of petitioner's discharge under either standard would produce the same result. There is no factual dispute concerning petitioner's failure to accept reassignment; nor is there any question concerning the agency's authority to discharge an employee who refuses reassignment (Pet. App. A18). Thus petitioner's discharge was proper so long as the reassignment itself was proper. The court of appeals reviewed the record and concluded that the reason given for the transfer—petitioner's inability to get along with his supervisors—was not a pretext to disguise an improper reason. Moreover, such "strained personal relationships * * * provide a permissible basis for a transfer." *Kletschka* v. *Driver*, 411 F.2d 436, 443 (C.A. 2). Accordingly, an inquiry into the substantiality of the evidence would look solely to the question whether there were such strained relations. On that score, the record is clear: there is ample evidence of petitioner's inability to get along with his supervisors and of his disruptive attitude and behavior (see R. 31, 66-68, 96-112, 136-155), and indeed petitioner makes no claim to the contrary. Since petitioner would not have been aided by the expanded scope of review for which he argues, the conflict he asserts is of merely abstract interest in this case and therefore is not an appropriate basis for granting review.

3. Petitioner's contention to the contrary notwithstanding, he was not denied "procedural or substantive safeguards" (Pet. 15-17). His claim appears to be that it was improper to place him on "absent without leave" status during the 30 days following the original notice

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of proposed discharge; he asserts that employees "ordinarily will remain on the payroll for at least 30 days after notice" (Pet. 15). But this, of course, is because the employee normally continues to perform his work responsibilities. Petitioner had refused to perform his, so that the "absent without leave" status was merited. An employee is not entitled to be carried in a pay status when he voluntarily absents himself from assigned duty.

4. Petitioner erroneously contends (Pet. 17-18) that his complaint presented an issue of fact that could not be resolved on motion for summary judgment. The grant of summary judgment correctly embodied a determination that any factual dispute over the reason for petitioner's transfer could be resolved on the basis of the administrative record. "[*D*]*e novo* review is appropriate only where there are inadequate factfinding procedures in an adjudicatory proceeding * * * ." *Camp* v. *Pitts,* 411 U.S. 138, 142. That is not the case here: the proceedings before the Civil Service Commission adequately and fully inquired into the reason for petitioner's transfer (see pp. 3-4, *supra*), and both the Commission's findings and the evidence therefor are set forth in the administrative record. In these circumstances, summary judgment on the basis of that record was appropriate.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

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